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Memorandum 92-23

Subject: Study N-107 - The Process of Administrative Adjudication
(Revised Draft of Previously Decided Policy Issues)

Attached to this memorandum is a staff draft that implements policy decisions made at the January 1992 Commission meeting. The Commission at its March 1992 meeting reviewed the first half of the draft (through Section 645.050), and the attached draft has been revised to reflect decisions made at that meeting.

Our objective, again, is to continue the process of perfecting the draft for incorporation in the general administrative procedure act being assembled.

Respectfully submitted,

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Executive Secretary

THE ADMINISTRATIVE ADJUDICATION PROCESS

OUTLINE

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DEFINITIONS

§ 610.350. Initial pleading 3/12/92

610.350. "Initial pleading" commencing an adjudicative proceeding includes an accusation, statement of issues, and order instituting investigation. The term also includes an amended or supplemental initial pleading as the context requires.

Comment. Section 610.350 supersedes former Section 11504.5 and portions of the first sentences of former Sections 11503 and 11504.

Staff Note. We have substituted "initial pleading" for "complaint", which had been used in the preceding draft.

§ 610.670. Respondent 2/24/92

610.670. "Respondent" means a person named as a party in an adjudicative proceeding whose legal right, duty, privilege, immunity, or other legal interest is determined in the proceeding.

Comment. Section 610.670 supersedes former Section 11500(c).

§ 610.672. Responsive pleading 4/01/92

610.672. "Responsive pleading" to an initial pleading includes a notice of defense. The term also includes an amended or supplemental responsive pleading as the context requires.

Comment. Section 610.672 supersedes a portion of former Section 11506.

Staff Note. We have substituted "responsive pleading" for "answer", which had been used in the preceding draft.

CHAPTER 1. GENERAL PROVISIONS

Article 1. Availability of Adjudicative Proceedings

§ 641.120. When adjudicative proceeding not required 2/24/92

641.120. An agency need not conduct a proceeding under this part as the process for formulating and issuing a decision to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise.

Comment. Section 641.120 is drawn from 1981 Model State APA § 4-101(a). The provision lists the situations in which an agency may issue a decision without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before any agency or court.

The section does not preclude emergency action in circumstances where that would be the appropriate adjudicative proceeding under Section [to be drafted].

§ 641.130. Modification of statute by regulation 3/12/92

641.130. If a provision of this part authorizes an agency to modify this part by regulation:

(a) To that extent the agency may adopt a regulation pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, that modifies this part or makes this part inapplicable, and the regulation, and not this part, governs the matter.

(b) The provision does not apply to an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, unless the provision states expressly that this part may be modified by regulation in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(c) The provision is subject to an express statute that governs the matter.

Comment. Section 641.130 recognizes that a number of the provisions of this part may be modified by an agency to suit the circumstances of the particular type of adjudication administered by

it. The modification may occur only by regulation duly adopted and promulgated under the Administrative Procedure Act. The modification may alter, or make inapplicable to the agency's administrative adjudications, the particular provision as to which modification is permitted.

In the interest of uniformity of procedure, the opportunity for modification is restricted in cases being heard by Office of Administrative Hearings personnel. These cases historically have been subject to a uniform procedure under the former Administrative Procedure Act. A number of provisions expressly authorize modification in an Office of Administrative Hearings case. See, e.g., Sections 641.310 (regulations governing declaratory decision), 648.310 (burden of proof), [additional references to be supplied].

Staff Note. We have referred in this draft to the ability of an agency to "modify" the statute by regulation, rather than to "vary" it. This is to help allay concerns that "variance" seems to imply minor changes only.

Article 3. Declaratory Decisions

Comment. Article 3 (commencing with Section 641.310) creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances. See generally Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731 at 805-824 (1975).

It should be noted that an agency not governed by this article nonetheless has general power to issue a declaratory decision. This power is derived from the power to adjudicate. See, e.g., M. Asimow, Advice to the Public from Federal Administrative Agencies 121-22 (1973).

Staff Note. Professor Asimow suggests that the conference hearing format might be appropriate to resolve declaratory decision cases. We will review this issue after we have made basic policy decisions concerning conference hearings.

§ 641.310. Regulations governing declaratory decision 3/12/92

641.310. (a) An agency may modify the provisions of this article by regulation. Notwithstanding Section 641.130, this subdivision applies in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(b) The Office of Administrative Hearings shall adopt and promulgate model regulations under this article that are consistent with the public interest and with the general policy of this part to facilitate and encourage agency issuance of reliable advice. The model regulations shall provide for all of the following:

(1) A description of the classes of circumstances in which an agency will not issue a declaratory decision.

(2) The form, contents, and filing of a petition for a declaratory decision.

(3) The procedural rights of a person in relation to a petition.

(4) The disposition of a petition.

(c) An agency may adopt the model regulations of the Office of Administrative Hearings in whole or in part, with or without change, to govern declaratory decisions of the agency.

Comment. Section 641.310 is drawn from 1981 Model State APA § 2-103(b). This section does not require each agency to adopt regulations; however, the model regulations developed by the Office of Administrative Hearings should provide a useful source for an agency if the agency does adopt regulations. An agency may choose to preclude declaratory decisions altogether. Cf. Section 641.130 (modification of statute by regulation).

Regulations should specify all of the details surrounding the declaratory decision process including a specification of the precise form and contents of the petition; when, how, and where a petition is to be filed; whether a petitioner has the right to an oral argument; the circumstances in which the agency will not issue a decision; and the like.

Regulations also should require a clear and precise presentation of facts, so that an agency will not be required to rule on the application of law to unclear or excessively general facts. The regulations should make clear that, if the facts are not sufficiently precise, the agency can require additional facts or a narrowing of the petition.

Agency rules on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion. To be valid these rules must also be consistent with the public interest--which includes the efficient and effective accomplishment of the agency's mission--and the express general policy of this article to facilitate and encourage the issuance of reliable agency advice. Within these general limits, therefore, an agency may include in its rules reasonable standing, ripeness, and other requirements for obtaining a declaratory decision.

§ 641.320. Declaratory decisions permissive 2/24/92

641.320. (a) In case of an actual controversy, a person may petition an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency.

(b) The agency in its discretion may issue a declaratory decision in response to the petition. The agency shall not issue a declaratory decision if the agency determines that any of the following applies:

(1) Issuance of the decision would be contrary to a regulation adopted under this article.

(2) The decision would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory decision proceeding.

(c) A petition for a declaratory decision is not required for exhaustion of the petitioner's administrative remedies for purposes of judicial review.

Comment. Subdivisions (a) and (b) of Section 641.320 are drawn from 1981 Model State APA § 2-103(a); subdivision (c) is new. Unlike the model act, Section 641.320 is applicable only to cases involving an actual controversy, and issuance of a declaratory decision is discretionary with, rather than mandatory for, the agency.

This section prohibits an agency from issuing a declaratory decision that would substantially prejudice the rights of a person who would be indispensable--that is a "necessary"--party, and who does not consent to the determination of the matter by a declaratory decision proceeding. Such a person may refuse to give consent because in a declaratory decision proceeding the person might not have all of the same procedural rights the person would have in another type of adjudicatory proceeding to which the person would be entitled.

§ 641.330. Notice of petition 2/24/92

641.330. Within 15 days after receipt of a petition for a declaratory decision, an agency shall give notice of the petition to all persons to whom notice is required by any statute or regulation, and may give notice to any other person.

Comment. Section 641.330 is drawn from 1981 Model State APA § 2-103(c).

§ 641.340. Applicability of rules governing administrative adjudications 3/12/92

641.340. (a) The provisions of this part other than this article do not apply to an agency proceeding for a declaratory decision except to the extent the agency so provides by regulation or order.

(b) Notwithstanding subdivision (a), a person who qualifies under Chapter 5 (commencing with Section 645.010) (intervention) and files a timely petition for intervention in accordance with agency regulations may intervene in a proceeding for a declaratory decision.

Comment. Section 641.340 is drawn from 1981 Model State APA § 2-103(d). It makes clear that an agency must allow persons to intervene in a declaratory decision proceeding to the same extent it allows intervention in other adjudicatory proceedings under this part. It also makes clear that all the other specific procedural requirements for adjudications imposed by this part on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable.

Regulations specifying precise procedures available in a declaratory proceeding are adopted under Section 641.310. The reason for exempting a declaratory decision from usual procedural requirements for adjudications provided in this part is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicatory provisions have no applicability. For example, cross-examination is unnecessary since the petition establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

Note that there are no contested issues of fact in a declaratory decision proceeding because its function is to declare the applicability of the law in question to unproven facts furnished by the petitioner. The actual existence of the facts on which the decision is based will usually become an issue only in a later proceeding in which a party to the declaratory decision proceeding seeks to use the decision as a justification of the party's conduct.

Note also that the party requesting a declaratory decision has the choice of refraining from filing such a petition and awaiting the ordinary agency adjudicative process governed by this part.

A declaratory decision is, of course, subject to any provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions.

§ 641.350. Action of agency 3/12/92

641.350. (a) Within 30 days after receipt of a petition for a declaratory decision, an agency shall do one of the following, in writing:

(1) Issue a decision declaring the applicability of the statute, regulation, or decision in question to the specified circumstances.

(2) Set the matter for specified proceedings.

(3) Agree to issue a declaratory decision by a specified time.

(4) Decline to issue a declaratory decision, stating the reasons for its action.

(b) A copy of a decision issued in response to a petition for a declaratory decision shall be mailed promptly to the petitioner and any other party.

(c) If an agency has not taken action under subdivision (a) within 60 days after receipt of a petition for a declaratory decision, the petition is deemed to have been denied.

Comment. Subdivision (a) of Section 641.350 is drawn from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of a petition within 30 days ensures a timely agency response to a declaratory decision petition, thereby facilitating planning by affected parties.

Subdivision (b) is drawn from 1981 Model State APA § 2-103(f). It requires that the agency communicate to the petitioner and to any other parties any decision it makes in response to a petition for a declaratory decision. This includes each of the types of decisions listed in paragraphs (1)-(4) of subdivision (a).

Under subdivision (a)(4), when the agency declines to issue a declaratory decision it must also include a statement of the precise grounds for the disposition. The statement of reasons will help to ensure that the agency carefully considers the propriety of the denial of a declaratory decision in the circumstances. Since an agency's refusal to issue a declaratory decision is "agency action" that is judicially reviewable, the required statement of reasons for an agency's refusal to issue such a decision will also ensure that the courts will have an opportunity for meaningful review of a negative agency response to the petition. If the agency improperly refuses to issue a declaratory decision because it acts beyond the scope of authority granted it, or abuses its discretion, the reviewing court must remand to the agency with directions to issue a declaratory decision. The court may not render a declaratory judgment determining the applicability of law within the agency's primary jurisdiction to the facts contained in the petition.

Subdivision (c) is drawn from 1981 Model State APA § 2-103(h). It eliminates the uncertainty as to when an agency's failure to act in response to a petition is final for purposes of seeking judicial review. Sixty days seems reasonable for this purpose since an agency should be allowed sufficient time to hold any proceedings it desires on such a petition before the petitioner can file proceedings for judicial review. Of course, the petitioner may seek judicial review of an agency's failure to issue a declaratory decision before 60 days from the date of the petition if, at an earlier time, the agency expressly declines to issue such a decision.

§ 641.360. Declaratory decision 3/12/92

641.360. (a) A declaratory decision shall contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for its conclusion.

(b) A declaratory decision has the same status and binding effect as any other decision issued in an agency adjudicative proceeding.

Comment. Section 641.360 is drawn from 1981 Model State APA § 2-103(g). A declaratory decision issued by an agency is judicially reviewable; is a binding on the petitioner, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications.

Note that a declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued.

Note also that the requirement in this section that each declaratory decision issued contain the facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and other persons interested in the decision because of its possible precedential effect.

CHAPTER 2. INITIATION OF PROCEEDING

§ 642.010. Initiation by agency 2/24/92

642.010. An agency may initiate an adjudicative proceeding with respect to a matter within the agency's jurisdiction.

Comment. Section 642.010 is drawn from 1981 Model State APA § 4-102(a). It prevents any implication that Section 642.020 (application for decision) sets forth the exclusive circumstances under which an agency may initiate an adjudicative proceeding.

§ 642.020. Application for decision 2/24/92

642.020. (a) Any person may make an application for an agency decision.

(b) An application for an agency decision includes an application for the agency to initiate an appropriate adjudicative proceeding, whether or not the applicant expressly requests the proceeding.

Comment. Section 642.020 is drawn from 1981 Model State APA § 4-102(c). It ensures that a person who requests an agency to issue a decision, but does not expressly request the agency to conduct an adjudicative proceeding, will not on that account be regarded as having waived the right to any available adjudicative proceeding. See Section [to be drafted] (waiver). This assurance may be especially important to protect unrepresented parties. In addition, this provision

clarifies that the term "application", as used in this part, may refer either to the request for the agency to issue a decision, or to the request for the agency to conduct an appropriate adjudicative proceeding, or both, as the context suggests. Similarly, the term "applicant" may be used with either or both meanings.

§ 642.030. Agency action on application 3/12/92

642.030. An agency shall initiate an adjudicative proceeding on application of a person for an agency decision for which a hearing or other adjudicative proceeding is required by Section 640.010 (when adjudicative proceeding required), unless any of the following provisions applies:

(a) The agency lacks jurisdiction of the subject matter.

(b) Resolution of the matter requires the agency to exercise discretion within the scope of Section 641.120 (when adjudicative proceeding not required).

(c) A statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding before issuing a decision to resolve the matter and, in the exercise of discretion, the agency has determined not to conduct an adjudicative proceeding.

(d) Resolution of the matter does not require the agency to issue a decision that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests.

(e) The matter is not timely submitted to the agency.

(f) The matter is not submitted in a form substantially complying with an applicable statute or regulation.

Comment. Section 642.030 is drawn from 1981 Model State APA § 4-102(b). It requires an agency to initiate an adjudicative proceeding on application of any person for an agency decision where a hearing is statutorily or constitutionally required. See Section 640.010 (when adjudicative proceeding required). If the agency determines that any of the exceptions provided in this section is applicable, the agency may deny the application without commencing an adjudicative proceeding, or the agency may, in its discretion under Section 642.010, commence an adjudicative proceeding although under no compulsion to do so. For the time within which an agency must act with respect to an application, see Section 642.040 (time for agency action). In situations where none of the exceptions is applicable, this section establishes the right of a person to require an agency to initiate an adjudicative proceeding.

Subdivision (b) relieves the agency from an obligation to conduct an adjudicative proceeding if resolution of the matter requires the agency to exercise discretion to initiate or not to initiate an investigation, prosecution, adjudicative proceeding, or other proceeding before the agency or another agency or a court. For

example, a person who submits a complaint about a licensee cannot compel the licensing agency to commence an adjudicative proceeding against the licensee; the agency may exercise prosecutorial discretion to determine whether to commence or not to commence an adjudicative proceeding in each case. The agency's decision whether or not to commence an adjudicative proceeding need not itself be preceded by an adjudicative proceeding. Section 641.120 (when adjudicative proceeding not required).

Subdivision (c), does not and could not authorize an agency to deprive any person of procedural rights guaranteed by the constitution. If a statute purporting to authorize an agency to dispense with an adjudicative proceeding, conflicts with constitutional guarantees the agency may exercise its discretion under Section 642.010 to conduct an adjudicative proceeding even though the statute does not require it or, if the agency fails to conduct a constitutionally required adjudicative proceeding, a reviewing court may give appropriate relief.

Subdivision (d) closely relates to the definition of "decision" in Section 610.310 as "agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person". If the applicant does not request agency action that would fit within the definition of a "decision", the agency need not commence an adjudicative proceeding. For example, if a person asks the agency to commence an adjudicative proceeding for the purpose of adopting a rule, or of carrying out a housekeeping function that affects nobody's legal rights, the request would be subject to dismissal because the requested agency action would not be a "decision". Subdivision (d) provides that an agency need not commence an adjudicative proceeding unless the applicant's legal rights, duties, privileges, immunities, or other legal interests are to be determined by the requested decision. Interpretation of these terms, ultimately a matter for the courts, will clarify the range of situations in which this part entitles a person to require an agency to initiate an adjudicative proceeding. The availability of various types of adjudicative proceedings may persuade courts to develop a more hospitable approach toward applicants than would have been feasible or practicable if the only available type of administrative adjudication were a trial-type, formal hearing.

Staff Note. The Commission asked the staff to review the drafting of this section to ensure that the section requires the agency to hold a hearing on application after denial of a license but does not require the agency to hold a hearing on application after denial of a consumer's request for a rate change. The staff has achieved this by linking the section with the general principle that an agency need conduct a hearing only where the hearing is otherwise statutorily or constitutionally required.

642.040. (a) The time limits in this section apply except to the extent they are inconsistent with limits established by another statute for any stage of the proceeding or with limits established by the agency by regulation.

(b) Within 30 days after receipt of an application for an agency decision, the agency shall examine the application, notify the applicant of any apparent error or omission, request any additional information from the applicant or another source that the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address, and telephone number of an agency member or employee who may be contacted regarding the application. Nothing in this subdivision limits the authority of the agency to request additional information more than 30 days after receipt of an application for an agency decision, but such a request and any response to the request do not extend the time provided in subdivision (c).

(c) Within 90 days after the later of (i) receipt of an application for an agency decision or (ii) receipt of the response to a timely request made by the agency under subdivision (b), the agency shall do one of the following:

(1) Approve or deny the application, in whole or in part. The agency shall serve on the applicant a written notice of any denial, which shall include a brief statement of the agency's reasons and of any administrative review available to the applicant.

(2) Commence an adjudicative proceeding.

Comment. Section 642.040 is drawn from 1981 Model State APA § 4-104(a). The effect of this section, when combined with Section 641.120, is that this part imposes no procedures on the agency when it decides not to conduct an adjudicative proceeding in response to an application for an agency decision, except to give a written notice of dismissal, with a brief statement of reasons and of any available administrative review. Agency decisions of this type, while not governed by the adjudicative procedures of this part, are subject to judicial review as a final agency action under Section [to be drafted].

Failure of an agency to meet the time limits provided in this section does not entitle the applicant to issuance of a license or other action sought in the application. The applicant's remedy for the

agency's failure is judicial action by writ of mandate to compel appropriate agency action.

An agency may modify the provisions of this section by regulation to tailor the procedures to suit its individual needs. The agency may, for example, provide shorter times for emergencies, and the like. The right of an agency to modify these provisions does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification of statute by regulation).

It should be noted that the time limits provided in this section are subject to contrary statutes that govern particular proceedings. See, e.g., [listing of contrary statutes to be supplied].

Staff Note. This section will be coordinated with the general provisions on administrative review of agency decisions.

CHAPTER 3. COMMENCEMENT

Article 1. General Provisions

§ 643.110. Provisions may be modified by regulation 2/24/92

643.110. An agency may modify the provisions of this chapter by regulation.

Comment. Section 643.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification of statute by regulation).

Article 2. Pleadings

§ 643.210. Proceeding commenced by initial pleading 3/12/92

643.210. An adjudicative proceeding is commenced by issuance of an initial pleading by an agency.

Comment. Section 643.210 supersedes portions of the first sentences of former Sections 11503 and 11504. See also Section 610.350 ("initial pleading" includes accusation and statement of issues). Included among the issues that may be adjudicated are whether a right, authority, license, or privilege should be granted, issued, or renewed on application of a person, or revoked, suspended, limited, or conditioned on initiation of an agency. Sections 642.010-642.040 (initiation of proceeding).

It should be noted that by regulation an agency may require preparation of the initial pleading by another party or may permit a denied application to serve as the initial pleading. In such a case, verification is required unless the agency provides otherwise by regulation. Section 643.220 (contents of initial pleading).

Nothing in this part requires an agency to commence a proceeding on demand of a third party. Such a right might have been implied under former Sections 11503 and 11504. There may, however, be specific

statutes that provide initiation rights to third parties. See, e.g., Bus. & Prof. Code § 24203 (accusations against liquor licensees filed by various public officials).

§ 643.220. Contents of initial pleading 3/12/92

643.220. (a) The initial pleading shall be in writing and shall include all of the following:

(1) A statement that sets forth in ordinary and concise language the issues to be determined in the adjudicative proceeding, including any acts or omissions with which the respondent is charged and any particular matters that have come to the attention of the agency and that would authorize a denial of the application. The statement shall be sufficient to enable the respondent to prepare a case.

(2) A specification of the statutes and regulations that are at issue in the adjudicative proceeding, including any the respondent is alleged to have violated or with which the respondent must show compliance by producing proof at the hearing. The specification shall not consist merely of issues or charges phrased in the language of the statutes and regulations.

(b) The initial pleading shall be verified unless made by a public officer acting in an official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. Section 643.220 supersedes portions of former Sections 11503 and 11504. The verification requirement would apply where an agency permits preparation of the initial pleading by another party, unless the requirement is modified by regulation. Cf. Comment to Section 643.210 (proceeding commenced by initial pleading).

§ 643.230. Service of initial pleading and other information 3/12/92

643.230. (a) On issuance of the initial pleading, the issuing agency shall serve on the respondent all of the following:

(1) A copy of the initial pleading.

(2) A statement to the respondent in the form provided in subdivision (b).

(3) A form of responsive pleading that acknowledges service of the initial pleading and constitutes a responsive pleading under Section 643.250.

(4) A copy of Chapter 6 (commencing with Section 646.110) (discovery).

(5) Any other information the agency deems appropriate.

(b) The statement to the respondent shall be substantially in the following form:

> Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying initial pleading is delivered or mailed to the agency within 15 days after the initial pleading was personally served on you or within 20 days after the initial pleading was mailed to you, [here insert name of agency] may proceed on the initial pleading without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Responsive Pleading, or by delivering or mailing a responsive pleading as provided by Government Code Section 643.250 to: [here insert name and address of agency].
>
> You may, but need not, be represented by counsel at any or all stages of this proceeding.
>
> If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Government Code Section 646.230 in the possession, custody, or control of the agency, you may contact: [here insert name and address of appropriate person].

(c) Notwithstanding Sections 613.010 (service) and 613.020 (mail), service under this section shall be other than by first class mail. This subdivision does not apply to service in an adjudicative proceeding before an appeals board if the respondent has previously appeared in the same or a related proceeding.

Comment. Section 643.230 is drawn from former Sections 11504 and 11505. Service is made by personal delivery or mail to the respondent's last known address. Sections 613.010 (service) and 613.020 (mail). Service under this section is limited to personal service or registered or certified mail; first class mail is not permissible except in cases before an appeals board such as the Unemployment Insurance Appeals Board, where the respondent has previous involvement in the controversy and initial service provisions are therefore unnecessary.

For purposes of service, the respondent's last known address is the address maintained with the agency, if the respondent is required to maintain an address with the agency. Section 613.010(b).

An agency that fails properly to serve the respondent does not acquire jurisdiction unless the respondent makes a general appearance. Section 643.240 (jurisdiction over respondent).

The form of responsive pleading may be a post card or other form provided by the agency. Signing and returning the form by the respondent acknowledges service of the initial pleading and constitutes a responsive pleading under Section 643.250.

Staff Note. *The general notice provision adopted by the Commission extends times by 5 days in the case of mailed notice, but does not further extend the time for out-of-state mail on the theory that state administrative proceedings generally involve persons within the state.*

Staff Note. *Statutory forms will be revised to reflect substantive changes made in the draft statute.*

§ 643.240. Jurisdiction over respondent 2/24/92

643.240. The agency shall make no decision adversely affecting the rights of the respondent unless the respondent has been served as provided in this article or has responded or otherwise appeared.

Comment. Section 643.240 continues a portion of former Section 11505(c).

§ 643.250. Responsive pleading 3/12/92

643.250. (a) Within 15 days after service of the initial pleading, or a later time that the agency in its discretion permits, the respondent may serve a responsive pleading on the agency.

(b) A responsive pleading shall be in writing signed by the respondent and shall state the respondent's mailing address. It need not be verified or follow any particular form.

(c) A responsive pleading may do one or more of the following:

(1) Request a hearing.

(2) Object to the initial pleading on the ground that it does not state an act or omission or other ground on which the agency may proceed.

(3) Object to the form of the initial pleading on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a case. Unless objection is taken under this paragraph, all further objections to the form of the initial pleading are deemed waived.

(4) Admit the initial pleading in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the initial pleading on the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation adopted by another agency affecting substantive rights.

(7) Raise such other matter as may be appropriate.

(c) The respondent is entitled to a hearing on the merits if the respondent serves a responsive pleading on the agency under subdivision (a). Any responsive pleading is deemed a specific denial of all parts of the initial pleading not expressly admitted.

(d) Failure to serve a responsive pleading on the agency under subdivision (a) is a default subject to the right of the respondent to serve a statement by way of mitigation under Section 648.130 (default).

Comment. Section 643.250 is drawn from former Section 11506. See also Sections 613.040 (attorney or other representative of party), 613.010 (service), 643.260 (amended and supplemental pleadings). If service is by mail, the respondent has 20 days after the date of mailing in which to respond. Section 613.030 (extension of time).

§ 643.260. Amended and supplemental pleadings 3/12/92

643.260. (a) At any time before commencement of the hearing a party may amend or supplement a pleading. After commencement of the hearing a party may amend or supplement a pleading in the discretion of the presiding officer.

(b) An amended or supplemental pleading shall be served on all parties.

(c) If an amended or supplemental pleading presents a new issue, the opposing party shall be given a reasonable opportunity to prepare a case. Any new matter is deemed controverted without further pleading, and any objection to the amended or supplemental pleading may be made orally and shall be noted in the record.

Comment. Section 643.260 is drawn from former Section 11507. It is broadened to permit amendment of responsive pleadings as well as initial pleadings, but is narrowed to subject amendments to the presiding officer's discretion after commencement of the hearing.

Staff Note. The question has arisen about usage of the term "presiding officer" as opposed to "decision maker". "Presiding officer" is used throughout this draft since it refers to the person, either within or outside the agency, who presides at the hearing. When a statute refers to a "decision maker", this includes both the presiding officer and the reviewing authority. See Section 610.320 ("decision maker" defined). It is used extensively in the provisions relating to the impartiality of the decision maker.

Article 3. Setting Matter for Hearing

§ 643.310. Time and place of hearing 2/24/92

643.310. (a) The agency conducting the adjudicative proceeding shall determine the time and place of the hearing. The hearing shall not be before expiration of the time within which the respondent is entitled to respond.

(b) If the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the agency shall consult the office and the time and place of hearing shall be subject to the availability of its staff.

Comment. Section 643.310 is drawn from former Sections 11508 and 11509.

§ 643.320. Postponement of time of hearing 3/12/92

643.320. (a) The hearing may be postponed in the discretion of the presiding officer on a showing of good cause for the postponement.

(b) A party may request a postponement within 10 business days after discovery of good cause for postponement. Failure to serve the request within 10 business days is deemed a waiver of the right to request postponement for that cause.

Comment. Section 643.320 is new. It is based on information in the notice of hearing form. Section 643.340.

Staff Note. The Commission decided to require a postponement request within 10 business days. The concept of a "business" day is defined for different purposes in different parts of the codes, but there is no Government Code definition of a business day. The relevant form, from which this section is drawn, refers to working days. Usually, if we want to allow more time for an action, we do it directly. The staff suggests that this section be revised to allow 15 calendar days.

§ 643.330. Venue and change of venue 3/12/92

643.330. (a) The hearing shall be held in the following location:

(1) City and County of San Francisco, if the transaction occurred or the respondent resides or is located within the First or Sixth Appellate District.

(2) County of Los Angeles, if the transaction occurred or the respondent resides or is located within the Second Appellate District or within the Fourth Appellate District other than the County of Imperial or San Diego.

(3) County of Sacramento, if the transaction occurred or the respondent resides or is located within the Third or Fifth Appellate District.

(4) County of San Diego, if the transaction occurred or the respondent resides or is located within the Fourth Appellate District in the County of Imperial or San Diego.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence or location, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides or is located.

(3) The parties may select any place within the state by agreement.

(c) The respondent may request, and the presiding officer in its discretion may grant or deny, a change in the place of the hearing.

Comment. Section 642.330 is drawn from former Section 11508. An agency may modify the provisions of this section by regulation (Section 643.110) unless the hearing is required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification of statute by regulation).

Subdivision (a)(4) recognizes creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) is new. It codifies practice authorizing a motion for change of venue. See 1 Ogden, Cal. Public Agency Prac. § 33.02[4][d] (1991).

Staff Note. Subdivision (c) vests change of venue decisions in the presiding officer, rather than the agency.

§ 643.340. Notice of hearing 3/12/92

643.340. (a) The agency shall serve a notice of hearing on all parties at least 10 days before the hearing.

(b) The notice of hearing shall be substantially in the following form and may include other information:

A hearing will be held before [here insert name of agency] at [here insert place of hearing] on the _____ day of _____, 19__, at the hour of _____, on the charges made or issues stated in the initial pleading served on you.

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the presiding officer within 10 working days after you discover the good cause. Failure to notify the presiding officer within 10 days will deprive you of a postponement.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel.

You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents, or other things by applying to [here insert appropriate office of agency].

Comment. Section 643.340 is drawn from former Sections 11509 and 11505. If notice of hearing is mailed, it must be mailed 15 days before the hearing date. Section 613.030 (extension of time).

Staff Note. Statutory forms will be revised to reflect substantive changes made in the draft statute.

CHAPTER 5. INTERVENTION

§ 645.010. Intervention permissive 3/12/92

645.010. The presiding officer may grant a petition for intervention if all of the following conditions are satisfied:

(a) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the notice of the hearing.

(b) The petition is made as early as practicable in advance of the hearing. If there is a prehearing conference, the petition shall be made in advance of the prehearing conference and shall be resolved at the prehearing conference.

(c) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, or immunities may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under a statute or regulation.

(d) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

Comment. Section 645.010 is drawn from 1981 Model State APA § 4-209(a). It provides that the presiding officer may grant the petition to intervene if a party satisfies the standards of the section. Subdivision (c) confers standing on a petitioner to intervene on demonstrating that the petitioner's "legal rights, duties, privileges, or immunities may be substantially affected by the proceeding ..." However, subdivision (d) imposes the further limitation that the presiding officer may grant the petition for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact of the proceedings on the legal rights, etc. of the petitioner for intervention (subdivision (c)) against the interests of justice and the need for orderly and prompt proceedings (subdivision (d)).

§ 645.020. Conditions on intervention 3/12/92

645.020. If a petitioner qualifies for intervention, the presiding officer may impose conditions on the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include the following:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition.

(b) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceedings.

(c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(d) Limiting or excluding the intervenor's participation in settlement negotiations.

Comment. Section 645.020 is drawn from 1981 Model State APA § 4-209(c). This section, authorizing the presiding officer to impose conditions on the intervenor's participation in the proceedings, is intended to permit the presiding officer to facilitate reasonable involvement of intervenors without subjecting the proceedings to unreasonably burdensome or repetitious presentations.

§ 645.030. Order granting, denying, or modifying intervention 3/12/92

645.030. (a) As early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying each petition for intervention, specifying any conditions, and briefly stating the reasons for the order.

(b) The presiding officer may modify the order at any time, stating the reasons for the modification.

(c) The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

Comment. Section 645.030 is drawn from 1981 Model State APA § 4-209(d). By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, this section is intended to give the parties and the petitioners for intervention an opportunity to prepare for the adjudicative proceeding. If the order was unfavorable, the petitioner may not seek judicial review on an expedited basis before the hearing commences or otherwise. Section 645.040 (intervention determination nonreviewable).

§ 645.040. Intervention determination nonreviewable 2/24/92

645.040. Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made under this chapter by the presiding officer in the presiding officer's sole discretion based on the knowledge and judgment of the presiding officer at that time, and the presiding officer's determination is not subject to administrative or judicial review.

Comment. Section 645.040 is new.

§ 645.050. Participation short of intervention 3/12/92

645.050. Nothing in this chapter precludes an agency from by regulation permitting participation by a person short of intervention as a party, subject to Chapter 8 (commencing with Section 642.810) (ex parte communications).

Comment. Section 645.050 recognizes that there are ways whereby an interested person can have an impact on an ongoing adjudication without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties. Agency regulations may provide for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party.

CHAPTER 6. DISCOVERY

Article 1. General provisions

§ 646.110. Application of chapter 2/24/92

646.110. (a) The provisions of this chapter provide the exclusive right to and method of discovery as to any proceeding governed by this part.

(b) An agency may modify the provisions of this chapter by regulation.

Comment. Subdivision (a) of Section 646.110 supersedes former Section 11507.5 and broadens it to apply to all administrative adjudications covered by this part.

Subdivision (b) does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, or where there is a specifically applicable statute that governs the matter such as in the case of workers' compensation or Insurance Commission ratemaking. Section 641.130 (modification of statute by regulation). Regulations adopted by an agency under authority of subdivision (b) could provide for such matters as protection of confidential information or other privileges, or could eliminate the right of discovery completely.

§ 646.120. Limitations on discovery 2/24/92

646.120. (a) This section is intended only to limit the scope of discovery. It is not intended to affect the methods of discovery allowed under this chapter.

(b) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under Section 648.470 (evidence of sexual conduct).

Comment. Section 646.120 supersedes subdivision (g) of former Section 11507.6.

§ 646.130. Depositions 2/24/92

646.130. (a) On verified petition of a party, the presiding officer or, if a presiding officer has not been appointed, the agency, may order that the testimony of a material witness residing within or

without the state be taken by deposition in the manner prescribed by law for depositions in civil actions.

(b) The petition shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose, stating all of the following:

(1) The nature of the pending proceeding.

(2) The name and address of the witness whose testimony is desired.

(3) A showing of the materiality of the testimony of the witness.

(4) A showing that the witness will be unable or can not be compelled to attend.

(c) Where the witness resides outside the state, the petitioning party shall obtain an order of court that the testimony of the witness be taken by deposition by filing a petition therefor in the superior court in Sacramento County. The proceedings on the petition shall be in accordance with the provisions of Section 11189.

Comment. Section 646.130 supersedes former Section 11511. The section authorizes the presiding officer, if one has been appointed, to order a deposition, and requires the petitioning party to obtain a court order where necessary.

§ 646.140. Subpoenas 2/24/92

646.140. (a) The agency or the presiding officer shall, at the request of a party, issue subpoenas for attendance at the hearing and subpoenas duces tecum for production of documents at any reasonable time and place or at the hearing.

(b) Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(c) Any objection to the terms of a subpoena or a subpoena duces tecum, including a motion to quash, shall be resolved by the presiding officer. A subpoena or a subpoena duces tecum issued by the agency on its own motion may be quashed by the agency.

(d) A witness appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, is entitled to all of the following fees,

mileage, and expenses of subsistence, to be paid by the party at whose request the witness is subpoenaed:

(1) Fees. This paragraph does not apply to an officer or employee of the state or a political subdivision of the state.

(2) Mileage in the same amount and under the same circumstances as prescribed by law for a witness in a civil action in a superior court.

(3) A per diem compensation of three dollars ($3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing, if the witness attends a hearing at a point so far removed from the witness' residence as to prohibit return to the residence from day to day.

Comment. Section 646.140 supersedes former Section 11510. It gives all adjudicating agencies subpoena power. The Coastal Commission previously lacked statutory subpoena power.

An agency, other than an agency whose hearings are required to be conducted by Office of Administrative Hearings personnel, may modify the subpoena provisions by regulation. Section 646.110. Regulations might provide, for example, that a subpoena will not issue unless the party seeking it first establishes the relevance of the evidence sought; or the regulation could provide different standards for subpeonas compelling the attendance of witnesses and subpoenas duces tecum.

Subdivision (a) broadens former law to allow a subpoena duces tecum to provide documents at any reasonable time and place rather than only at the hearing.

The first sentence of subdivision (c) adopts a procedure applicable in proceedings before the Public Utilities Commission. See 20 Cal. Code Regs. § 61. The second sentence clarifies the law on a previously unresolved issue.

The coverage of subdivision (d) is extended to a subpoena duces tecum as well as a subpoena.

For enforcement of a subpoena, see Section [11525].

Staff Note. Professor Asimow recommends that the contempt procedures for enforcing subpoenas (Section 11525) be revised to make clear that either party may apply to the court for enforcement, but only after a good faith effort to resolve the dispute, and the party held in contempt would have the opportunity to respond after the court has upheld the subpoena. See Background Study at p. 35. We will address these matters in the context of general enforcement of orders in the administrative adjudication process.

Article 2. Discovery

§ 646.210. Time and manner of discovery 2/24/92

646.210. After commencement of a proceeding, a party, on written request to another party, before the hearing and within 30 days after

service on the party of the initial pleading or within 15 days after service on the party of an additional or supplemental initial pleading, is entitled to discovery to the extent provided in this article.

Comment. Section 646.210 supersedes the introductory portion of the first paragraph of former Section 11507.6.

§ 646.220. Discovery of witness list

646.220. A party requesting discovery under this article is entitled to obtain the names and addresses of witness to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing.

Comment. Section 646.220 supersedes clause (1) of the first paragraph of former Section 11507.6.

§ 646.230. Discovery or statements, writings, and reports

646.230. (a) As used in this section, "statement" includes all of the following:

(1) A written statement by a person signed or otherwise authenticated by the person.

(2) A stenographic, mechanical, electrical, or other recording or transcript of an oral statement by a person.

(3) A written report or summary of an oral statement by a person.

(b) A party requesting discovery under this article is entitled to inspect and make a copy of any of the following in the possession or custody or under the control of another party:

(1) A statement of a person, other than the respondent, named in the initial pleading, when it is alleged that the act or omission of the respondent as to the person is the basis for the adjudicative proceeding.

(2) A statement pertaining to the subject matter of the proceeding made by a party to another party or person.

(3) A statement of a witness then proposed to be called by the party and of any other person having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, not included in paragraph (1) or (2).

(4) All writings, including, but not limited to, reports of mental, physical, and blood examinations, and things that the party then proposes to offer in evidence.

(5) Any other writing or thing that is relevant and that would be admissible in evidence.

(6) An investigative report made by or on behalf of the party pertaining to the subject matter of the proceeding, to the extent that the report (i) contains the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, or (ii) reflects matters perceived by the investigator in the course of the investigation, or (iii) contains or includes by attachment any statement or writing or summary of a statement or writing described in this section.

(c) Nothing in this section authorizes the inspection or copying of any writing or thing that is privileged from disclosure by law or otherwise made confidential or protected as an attorney's work product.

Comment. Section 646.230 supersedes clause (2) of the first paragraph, subdivisions (a)-(f), and the second and third paragraphs of former Section 11507.6. See also Section 610.350 ("initial pleading" defined).

Article 3. Compelling Discovery

§ 646.310. Petition to compel discovery 2/24/92

646.310. (a) A party claiming that a request for discovery under this chapter has not been complied with may serve and file a verified petition to compel discovery in the superior court for the county in which the hearing will be held, naming as respondent the party refusing or failing to comply with the request.

(b) The petition shall state facts showing the respondent party failed or refused to comply with the request, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under this chapter, and the ground or grounds of respondent's refusal so far as known to petitioner.

Comment. Section 646.310 continues subdivision (a) of former Section 11507.7. See also Sections 613.040 (attorney or other representative of party) and 613.010 (service). A reference in this article to a matter or order includes part of a matter or order.

§ 646.320. Time for petition 2/24/92

646.320. (a) Subject to subdivision (b), the petition shall be served on the respondent party and filed within 15 days after the respondent party first evidenced failure or refusal to comply with the request, or within 30 days after the request was made and the party has failed to reply to the request, whichever period is longer.

(b) No petition may be filed within 15 days of the date set for commencement of the hearing except on order of the court after motion and notice and for good cause shown. In acting on the motion, the court shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the hearing on the date set, and the possible prejudice to any party.

Comment. Section 646.320 continues subdivision (b) of former Section 11507.7.

§ 646.330. Order to show cause 2/24/92

646.330. (a) If from a reading of the petition the court is satisfied that the petition sets forth good cause for relief, the court shall issue an order to show cause directed to the respondent party; otherwise the court shall enter an order denying the petition.

(b) The order to show cause shall be served on the respondent and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the filing of the petition.

(c) The respondent party has the right to serve and file a written responsive pleading or other response to the petition and order to show cause.

Comment. Section 646.330 continues subdivision (c) of former Section 11507.7.

§ 646.340. Stay of proceedings 2/24/92

646.340. The court may in its discretion order the adjudicative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to give the parties time to comply with the court order.

Comment. Section 646.340 continues subdivision (d) of former Section 11507.7.

§ 646.350. Lodging matters with court 2/24/92

646.350. Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that the matter is not a discoverable matter or is privileged against disclosure under this chapter, the court may order lodged with it matters provided in, and examine the matters in accordance with the provisions of, subdivision (b) of Section 915 of the Evidence Code.

Comment. Section 646.350 continues subdivision (e) of former Section 11507.7.

§ 646.360. Court order 2/24/92

646.360. (a) The court shall decide the case on the matters examined by the court in camera, the papers filed by the parties, and oral argument and additional evidence the court allows.

(b) Unless otherwise stipulated by the parties, the court shall no later than 30 days after the filing of the petition file its order denying or granting the petition. The court may on its own motion for good cause extend the time an additional 30 days.

(c) The order of the court shall be in writing setting forth the matters the petitioner is entitled to discover under this chapter.

(d) A copy of the order shall forthwith be served by mail by the clerk on the parties. Where the order grants the petition in whole or in part, the order does not become effective until 10 days after the date the order is served by the clerk. Where the order denies relief to the petitioning party, the order is effective on the date it is served by the clerk.

Comment. Section 646.360 continues subdivisions (f) and (g) of former Section 11507.7.

§ 646.370. Review of court order 2/24/92

646.370. (a) The order of the superior court is final and not subject to review by appeal.

(b) A party aggrieved by the superior court's order may within 15 days after service of the order serve and file in the district court of appeal for the district in which the superior court is located, a petition for a writ of mandamus to compel the superior court to set aside or otherwise modify the order.

(c) Where review is sought from an order granting discovery, the order of the trial court and the administrative proceeding shall be stayed on the filing of the petition for writ of mandamus, provided, however, the court of appeal may dissolve or modify the stay thereafter if it is in the public interest to do so. Where review is sought from a denial of discovery, neither the trial court's order nor the administrative proceeding shall be stayed by the court of appeal except on a clear showing of probable error.

Comment. Section 646.370 continues subdivision (h) of former Section 11507.7.

§ 646.380. Sanctions 2/24/92

646.380. (a) Where the superior court finds that a party or the party's attorney, without substantial justification, failed or refused to comply with the request for discovery, or, without substantial justification, filed a petition to compel discovery under this article, or, without substantial justification, failed to comply with any order of court made under this article, the court may award court costs and reasonable attorney fees to the opposing party.

(b) Nothing in this section limits the power of the superior court to compel obedience to its orders by contempt proceedings.

Comment. Section 646.380 continues subdivision (i) of former Section 11507.7. See also Section 613.040 (attorney or other representative of party).

CHAPTER 7. PREHEARING CONFERENCE

§ 647.010. Modification by regulation 2/24/92

647.010. An agency may modify the provisions of this chapter by regulation.

Comment. Section 647.010 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification of statute by regulation). In other hearings, an agency may dispense with or change the provisions of this chapter relating to prehearing conferences by regulation.

§ 647.020. Conduct of prehearing conference 2/24/92

647.020. (a) On motion of a party or by order of the presiding officer, the presiding officer may conduct a prehearing conference.

(b) The presiding officer shall set the time and place for the prehearing conference, and the agency shall give reasonable written notice to all parties.

(c) The presiding officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

[(d) At the prehearing conference the proceeding, without further notice, may be converted into a conference adjudicative hearing for disposition of the matter as provided in this part. The notice of the prehearing conference shall so inform the parties.]

(e) A party who fails to attend or participate in a prehearing conference may be held in default under this part. The notice of the prehearing conference shall so inform the parties.

Comment. Subdivisions (a) and (b) of Section 647.020 supersede former Section 11511.5(a).

Subdivision (c) is a procedural innovation drawn from 1981 Model State APA § 4-205(a) that allows the presiding officer to conduct all or part of the prehearing conference by telephone, television, or other electronic means, such as a conference telephone call. The right to "see the entire proceeding" would be satisfied even if a party could not view all participants, so long as the party had a reasonable opportunity, throughout the duration of the proceedings, to view an aspect of the proceedings that was significant to the viewer, such as the demeanor of an adverse witness while testifying. While subdivision (c) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceedings in the physical presence of all participants.

Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii).

Subdivision (e) is drawn from 1981 Model State APA § 4-204(3)(viii). For default procedures, see Section 648.130.

Staff Note. Subdivision (d) assumes adoption of the conference hearing option.

§ 647.030. Subject of prehearing conference 2/24/92

647.030. A prehearing conference may deal with one or more of the following matters:

(a) Exploration of settlement possibilities.

(b) Preparation of stipulations.

(c) Clarification of issues.

(d) Rulings on identity and limitation of the number of witnesses.

(e) Objections to proffers of evidence.

(f) Order of presentation of evidence and cross-examination.

(g) Rulings regarding issuance of subpoenas and protective orders.

(h) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(i) Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

(j) Petitions for intervention.

(k) Any other matters that promote the orderly and prompt conduct of the hearing.

Comment. Section 647.030 supersedes former Section 11511.5(b). Subdivision (i) is new. If a party has not availed itself of discovery within the time periods provided by Chapter 6 (commencing with Section 646.110), it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of information concerning evidence to be offered at the hearing. Subdivision (j) implements Section 645.010 (intervention permissive).

§ 647.040. Prehearing order 2/24/92

647.040. The presiding officer shall issue a prehearing order incorporating the matters determined at the prehearing conference. The presiding officer may direct one or more of the parties to prepare the prehearing order.

Comment. Section 647.040 supersedes former Section 11511.5(c).

CHAPTER 8. CONDUCT OF PROCEEDINGS

Article 1. General Provisions

§ 648.110. Provisions may be modified by regulation 2/24/92

648.110. An agency may modify the provisions of this chapter by regulation.

Comment. Section 648.110 does not apply to hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification of statute by regulation).

§ 648.120. Consolidation and severance 2/24/92

648.120. (a) When proceedings that involve a common question of law or fact are pending, an agency may order a joint hearing of any or all the matters in issue in the proceedings. The agency may order all the proceedings consolidated and it may make orders concerning the procedure that may tend to avoid unnecessary costs or delay.

(b) An agency, in furtherance of convenience or to avoid prejudice, or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the responsive pleading, or of any number of issues.

Comment. Section 648.120 is drawn from Code of Civil Procedure Section 1048. Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to be consolidated in a single proceeding, and to enable an agency to employ class action procedures in the agency's discretion. See also Section 13 (singular includes plural).

Staff Note. Mark Levin agrees agencies should have power consolidate or sever cases, but would limit the power to instances initiated by a party. "In other words, the agency should not be permitted to unilaterally consolidate or sever multiple matters. The party moving for consolidation or severance must bear the burden of demonstrating the appropriateness of consolidation or severance, i.e., how would the consolidation or severance enhance the resolution of the matters before the agency?" The primary effect of the suggestion would appear to be to limit consolidation or severance by an adjudicating agency that is not a party, such as the Public Employment Relations Board.

§ 648.130. Default 4/1/92

648.130. (a) If the respondent fails to serve a responsive pleading or to appear at a pre-hearing conference or at the hearing or other stage of the adjudicative proceeding:

(1) The default is a waiver of the respondent's right to a hearing.

(2) Notwithstanding the default, the respondent may serve a statement and make a showing by way of mitigation.

(3) The agency may take action based on the respondent's express admissions or on other evidence. Affidavits may be used as evidence without notice to the respondent.

(4) Where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence.

(b) Notwithstanding the respondent's default, the agency or the presiding officer in its discretion may grant a hearing on reasonable notice to the parties.

(c) Within 7 days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing.

Comment. Subdivisions (a) and (b) of Section 643.250 are drawn from subdivisions (b) and (d) of former Section 11506 (with the addition of the provision enabling the presiding officer to waive a default and requiring reasonable notice) and from former Section 11520. Subdivision (c) is new.

Article 2. Alternative Dispute Resolution

§ 648.210. Settlement 2/24/92

648.210. (a) The parties to an administrative adjudication may, before or after issuance of an initial pleading, settle the matter on any terms the parties determine are appropriate.

(b) An agency head may delegate the power to approve a settlement.

Comment. Subdivision (a) of Section 648.210 codifies the rule in Rich Vision Centers, Inc. v. Bd. of Med. Exam., 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983). It also makes clear that an agency can settle a case without filing an initial pleading. This provision is subject to a specific statute to the contrary governing the matter. See, e.g., Labor Code § 5001 (workers' compensation settlement must be approved by board or workers' compensation judge).

An agency may, but is not required to, put in place a system of settlement judges, whereby a judge of comparable status to the presiding officer who will hear the case is assigned to help mediate a settlement on request of a party. See also Section 647.030(a) (prehearing conference to explore settlement possibilities).

§ 648.220. Mediation 2/24/92

648.220. (a) An agency may, with the consent of all the parties, refer a dispute that is subject to administrative adjudication to mediation by an outside mediator. The mediator may use any mediation technique.

(b) The Office of Administrative Hearings shall adopt and promulgate model regulations that include provisions explaining how a mediator is selected and compensated, the qualifications of a mediator,

and for confidentiality of the mediation proceeding. An agency may adopt the model regulations of the Office of Administrative Hearings in whole or in part, with or without change, to govern disputes referred to mediation.

Comment. Section 648.220 is new. This section does not require each agency to adopt regulations; however, the model regulations developed by the Office of Administrative Hearings should provide a useful source for an agency if the agency does adopt regulations. The agency may choose to preclude mediation altogether.

The Office of Administrative Hearings could maintain a roster of mediators who are available for dispute settlement in all administrative agencies.

Staff Note. This section departs from Professor Asimow's recommendation that each agency should adopt mediation regulations, but is consistent with Professor Asimow's general suggestion that OAH adopt a model set of regulations that could be picked up by any agency. The issue is, should the agency be required to adopt the regulations expressly, either incorporating them by reference or reproducing them wholesale. The argument in favor of requiring wholesale reproduction is that this will make the law more accessible to a person having to use it.

§ 648.230. Nonbinding arbitration 2/24/92

648.230. (a) An agency may, with the consent of all the parties, refer a dispute that is subject to administrative adjudication to nonbinding arbitration by an outside arbitrator.

(b) The arbitrator's decision in the nonbinding arbitration shall be the basis of settlement of the dispute, unless the arbitrator's decision is rejected by a party. If the arbitrator's decision is rejected by a party, the administrative adjudication shall proceed and, if the final decision in the dispute is less favorable to the party than the arbitrator's decision, the party shall pay the costs and reasonable expenses of adjudication of the other parties.

(c) The Office of Administrative Hearings shall adopt and promulgate regulations that include provisions explaining how an arbitrator is selected and compensated, the qualifications of an arbitrator, and for confidentiality of the arbitration proceeding. An agency may adopt the model regulations of the Office of Administrative Hearings in whole or in part, with or without change, to govern disputes referred to nonbinding arbitration.

Comment. Section 648.230 is new. This section does not require each agency to adopt regulations; however, the model regulations developed by the Office of Administrative Hearings should provide a useful source for an agency if the agency does adopt regulations. The agency may choose to preclude arbitration altogether.

The Office of Administrative Hearings could maintain a roster of arbitrators who are available for dispute settlement in all administrative agencies.

Staff Note. See note on previous section.

Subdivision (b) is problematical in a number of respects. Does it extend to judicial review as well as administrative hearing and review? "Costs and expenses" are not as well defined in administrative as in civil litigation. How are the agency's expenses to be calculated if it is using in-house legal and other personnel? The concept of a more favorable result may be even more nebulous in the context of administrative adjudication than it is in civil litigation. If, as typically occurs, the arbitrator compromises and splits the difference, we may have appeals on both sides: should this negate the cost shifting provision?

§ 648.240. Confidentiality of communications in alternative dispute resolution 2/24/92

648.240. Notwithstanding any other statute:

(a) If a proceeding for settlement, mediation, non-binding arbitration, or other alternative dispute resolution occurs under this article:

(1) Evidence of anything said or of any admission made in the course of the proceeding is not admissible in evidence, and disclosure of the evidence shall not be compelled, in any administrative adjudication or civil action in which, pursuant to law, testimony can be compelled to be given.

(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the proceeding, or copy of the document, is admissible in evidence, and disclosure of the document shall not be compelled, in any administrative adjudication or civil action in which, pursuant to law, testimony can be compelled to be given.

(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the settlement, mediation, non-binding arbitration, or other alternative dispute resolution consent to its disclosure.

Comment. Section 648.240 applies notwithstanding Sections 648.410 (technical rules of evidence inapplicable) and 648.110 (provisions may be modified by regulation). Section 648.240 is drawn from Evidence Code Section 1152.5(a)-(b).

Article 3. Testimony and Witnesses

§ 648.310. Burden of proof 2/24/92

648.310. (a) The proponent of a matter has both the burden of producing evidence and the burden of proof on the matter. Except as provided in subdivision (b), the burden of proof is a preponderance of the evidence.

(b) In an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, the burden of proof is clear and convincing proof unless the agency provides a different burden by regulation. Notwithstanding Section 641.130, an agency may provide a different burden by regulation in an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 648.310 generally codifies case law concerning the burden of proof in administrative adjudications. See discussion in 1 G. Ogden, California Public Agency Practice § 39 (1991).

It should be noted that an agency whose hearings are required to be conducted by an administrative law judge employed by the Office of Administrative Hearings may provide a different burden of proof by regulation than that provided in subdivision (b) despite the general rule of Section 641.130 (modification of statute by regulation). See also Section 648.110 (provisions may be modified by regulation).

This section is also subject to specific statutes to the contrary. See Section 642.010 (applicable hearing procedure).

If a party defaults in a case where the party has the burden of proof, the agency may act without taking evidence. Section [11520(a)].

§ 648.320. Presentation of testimony 2/24/92

648.320. (a) Each party has the right to do all of the following:

(1) Call and examine witnesses.

(2) Introduce exhibits.

(3) Cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination.

(4) Impeach any witness regardless of which party first called the witness to testify.

(5) Rebut the evidence against the party.

(b) If the respondent does not testify in the respondent's own behalf, the respondent may be called and examined as if under cross-examination.

Comment. Section 648.320 continues former Section 11513(b).

§ 648.330. Oral and written testimony 2/24/92

648.330. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Any part of the evidence may be received in written form if to do so will expedite the hearing without substantial prejudice to the interests of any party.

(c) Documentary evidence may be received in the form of a copy or excerpt. On request, parties shall be given an opportunity to compare the copy with the original if available.

Comment. Subdivision (a) of Section 648.330 continues former Section 11513(a).

Subdivision (b) is drawn from 1981 Model State APA § 4-212(d).

Subdivision (c) is drawn from 1981 Model State APA § 4-212(e). It requires that parties be given an opportunity to compare a copy with the original, "if available". If the original is not available, the copy may still be received in evidence, but its probative effect is likely to be weaker than if the original were available.

§ 648.340. Affidavits 2/24/92

648.340. (a) At any time 30 or more days before a hearing or a continued hearing, a party may serve on the opposing party a copy of an affidavit the party proposes to introduce in evidence, together with a notice substantially in the following form:

> The accompanying affidavit of [here insert name of affiant] will be introduced as evidence at the hearing in [here insert title of proceeding]. [Here insert name of affiant] will not be called to testify orally and you will not be entitled to question the affiant unless you notify [here insert name of proponent or proponent's attorney] at [here insert address] that you wish to cross-examine the affiant.
>
> To be effective your request must be mailed or delivered to [here insert name of proponent or proponent's attorney] on or before [here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party].

(b) Unless the opposing party, within seven days after service, serves on the proponent a request to cross-examine the affiant, the opposing party's right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally.

(c) If an opportunity to cross-examine an affiant is not given after request to cross-examine is made as provided in this section, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

Comment. Section 648.340 continues former Section 11514, except the notice must be served at least 30, rather than seven, days before the hearing.

Staff Note. Statutory forms will be revised to reflect substantive changes made in the draft statute.

§ 648.350. Protection of child witnesses 2/24/92

648.350. Notwithstanding any other provision of this part, the presiding officer may conduct the hearing, including the manner of examining witnesses, in such a way as may be appropriate to protect a child witness from intimidation or other harm, taking into account the rights of all persons.

Comment. Section 648.350 codifies an aspect of Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987).

Article 4. Evidence

§ 648.410. Technical rules of evidence inapplicable 2/24/92

648.410. (a) Except as provided in this chapter, the hearing need not be conducted in accordance with technical rules relating to evidence and witnesses.

(b) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of the evidence over objection in a civil action.

Comment. Section 648.410 continues the first two sentences of former Section 11513(c). The intent of Section 648.410 is to make available to the fact finder evidence that might not be admissible under evidentiary limitations of civil or criminal cases. Thus, for

example, the Evidence Code rules relating to excludability of evidence about prior convictions should not apply automatically in the administrative setting. Contrast Coburn v. State Personnel Board, 83 Cal. App. 3d 801, 148 Cal. Rptr. 134 (1978).

An agency may make the Evidence Code applicable in the agency's administrative hearings notwithstanding this section. Section 648.110. An agency may not modify the rules in this chapter for hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings. Section 641.130 (modification of statute by regulation).

§ 648.420. Discretion of presiding officer to exclude evidence 2/24/92

648.420. The presiding officer in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

Comment. Section 648.420 supersedes the last clause of the first paragraph of former Section 11513(c) (exclusion of irrelevant and unduly repetitious evidence). It is drawn from Evidence Code Section 352.

§ 648.430. Review of presiding officer evidentiary rulings 2/24/92

648.430. A ruling of the presiding officer admitting or excluding evidence is subject to administrative review in the same manner and to the same extent as the presiding officer's initial decision in the proceeding.

Comment. Section 648.430 is new. It overrules any contrary implication that might be drawn from former Section 11512(b).

§ 648.440. Privilege 2/24/92

648.440. The rules of privilege are effective to the extent that they are otherwise required by statute to be recognized at the hearing.

Comment. Section 648.440 continues the first portion of the last sentence of the first paragraph of former Section 11513(c).

§ 648.450. Hearsay evidence and the residuum rule 2/24/92

648.450. (a) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

ALTERNATIVE (b1) On judicial review of the decision in the proceeding, a party may object to a finding supported only by hearsay evidence in violation of subdivision (a), whether or not the objection was previously raised in the adjudicative proceeding.

ALTERNATIVE (b2) On judicial review of the decision in the proceeding, a party may not object to a finding supported only by hearsay evidence in violation of subdivision (a), unless an objection was previously raised in the adjudicative proceeding, either during the hearing or on administrative review. This subdivision applies only if administrative review of the decision after the hearing was available.

Comment. Subdivision (a) of Section 648.450 continues the third sentence of former Section 11513(c).

It should be noted that an agency, other than one whose hearings are required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, may provide a different rule by regulation than the one provided in this section. See Section 648.110 (provisions may be modified by regulation) & Comment. See also Section 641.130 (modification of statute by regulation).

Staff Note. The Commission asked to see two alternative drafts concerning the right to raise the residuum rule for the first time on judicial review. These are set out as (b1) and (b2).

§ 648.460. Unreliable scientific evidence 2/24/92

648.460. Notwithstanding any other provision of this chapter, evidence based on methods of proof that are not generally accepted as reliable in the scientific community shall be excluded.

Comment. Section 648.460 codifies case law applicable to administrative hearings. Seering v. Department of Social Services, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). This section applies notwithstanding agency rules to the contrary.

Staff Note. The introductory clause of this section would preclude an agency from overriding it by regulation.

§ 648.470. Evidence of sexual conduct 2/24/92

648.470. (a) As used in this section "complainant" means a person claiming to have been subjected to conduct that constitutes sexual harassment, sexual assault, or sexual battery.

(b) Notwithstanding any other provision of this chapter:

(1) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of

specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at the hearing unless offered to attack the credibility of the complainant, as provided for under subdivision (c). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(2) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

Comment. Subdivision (a) of Section 648.470 continues former Section 11513(k). Subdivision (b) continues the second paragraph of former Section 11513(c). Subdivision (c) continues former Section 11513(j). This section applies notwithstanding agency rules to the contrary.

Gov't Code § 11500 (repealed). Definitions

11500. In this chapter unless the context or subject matter otherwise requires:

(c) "Respondent" means any person against whom an accusation is filed pursuant to Section 11503 or against whom a statement of issues is filed pursuant to Section 11504.

Comment. Subdivision (c) is superseded by Section 610.670 ("respondent" defined).

Gov't Code § 11503 (repealed). Accusation

11503. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Comment. The first sentence of former Section 11503 is superseded by Sections 610.350 ("initial pleading" includes accusation) and 643.210 (proceeding initiated by initial pleading). The remainder is superseded by Section 643.220 (contents of initial pleading).

§ 11504 (repealed). Statement of issues

11504. A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency

action sought. The statement of issues shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation; provided, that, if the hearing is held at the request of the respondent, the provisions of Sections 11505 and 11506 shall not apply and the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in Section 11509. Unless a statement to respondent is served pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7, and the name and address of the person to whom requests permitted by Section 11505 may be made, shall be served with the statement of issues.

Comment. The first sentence of former Section 11504 is superseded by Sections 610.350 ("initial pleading" includes statement of issues) and 643.210 (proceeding initiated by initial pleading). The remainder is superseded by Sections 643.220 (contents of initial pleading) and 643.230 (service of initial pleading).

§ 11504.5 (repealed). References to accusations include statements of issues

11504.5. In the following sections of this chapter, all references to accusations shall be deemed to be applicable to statements of issues except in those cases mentioned in subdivision (a) of Section 11505 and Section 11506 where compliance is not required.

Comment. Section 11504.5 is superseded by Section 610.350 ("initial pleading" includes accusation and statement of issues).

§ 11505 (repealed). Service on respondent

11505. (a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon

him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 in the possession, custody or control of the agency, you may contact: (here insert name and address of appropriate person).

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency within 10 working days after you discover the good cause. Failure to notify the agency within 10 days will deprive you of a postponement.

(c) The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency.

Comment. Section 11505 is superseded by Sections 643.230 (service of initial pleading and other information), 643.340 (notice of hearing), 643.240 (jurisdiction over respondent), 613.010 (service), and 613.020 (mail).

§ 11506 (repealed). Notice of defense

11506. (a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

(c) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form.

(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

Comment. Former Section 11506 is superseded by Sections 610.672 ("responsive pleading" defined), 643.250 (responsive pleading), and 613.010 (service).

§ 11507 (repealed). Amended accusation

11507. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Comment. Former Section 11507 is superseded by Section 643.260 (amended and supplemental pleadings).

§ 11507.5 (repealed). Discovery provisions exclusive

11507.5. The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter.

Comment. Former Section 11507.5 is superseded by Section 646.110 (application of article).

§ 11507.6 (repealed). Discovery

11507.6. After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after such service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;

(d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigate reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to

be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (j) of Section 11513. This subdivision is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed under this section.

Comment. Former Section 11507.6 is superseded by Sections 646.210 (time and manner of discovery), 646.220 (discovery of witness list), 646.230 (discovery or statements, writings, and reports), and 646.120 (limitations on discovery).

§ 11507.7 (repealed). Petition to compel discovery

11507.7. (a) Any party claiming his request for discovery pursuant to Section 11507.6 has not been complied with may serve and file a verified petition to compel discovery in the superior court for the county in which the administrative hearing will be held, naming as respondent the party refusing or failing to comply with Section 11507.6. The petition shall state facts showing the respondent party failed or refused to comply with Section 11507.6, a description of the matters sought to be discovered, the reason or reasons why such matter is discoverable under this section, and the ground or grounds of respondent's refusal so far as known to petitioner.

(b) The petition shall be served upon respondent party and filed within 15 days after the respondent party first evidenced his failure or refusal to comply with Section 11507.6 or within 30 days after request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the administrative hearing except upon order of the court after motion and notice and for good cause shown. In acting upon such motion, the court shall consider the necessity and reasons for such discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the administrative hearing on the date set, and the possible prejudice of such action to any party.

(c) If from a reading of the petition the court is satisfied that the petition sets forth good cause for relief, the court shall issue an order to show cause directed to the respondent party; otherwise the court shall enter an order denying the petition. The order to show cause shall be served upon the respondent and his attorney of record in the administrative proceeding by personal delivery or certified mail

and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the filing of the petition. The respondent party shall have the right to serve and file a written answer or other response to the petition and order to show cause.

(d) The court may in its discretion order the administrative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to afford the parties time to comply with the court order.

(e) Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that such matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under such provisions, the court may order lodged with it such matters as are provided in subdivision (b) of Section 915 of the Evidence Code and examine such matters in accordance with the provisions thereof.

(f) The court shall decide the case on the matters examined by the court in camera, the papers filed by the parties, and such oral argument and additional evidence as the court may allow.

(g) Unless otherwise stipulated by the parties, the court shall no later than 30 days after the filing of the petition file its order denying or granting the petition, provided, however, the court may on its own motion for good cause extend such time an additional 30 days. The order of the court shall be in writing setting forth the matters or parts thereof the petitioner is entitled to discover under Section 11507.6. A copy of the order shall forthwith be served by mail by the clerk upon the parties. Where the order grants the petition in whole or in part, such order shall not become effective until 10 days after the date the order is served by the clerk. Where the order denies relief to the petitioning party, the order shall be effective on the date it is served by the clerk.

(h) The order of the superior court shall be final and not subject to review by appeal. A party aggrieved by such order, or any part thereof, may within 15 days after the service of the superior court's order serve and file in the district court of appeal for the district in which the superior court is located, a petition for a writ of mandamus to compel the superior court to set aside or otherwise modify its order. Where such review is sought from an order granting

discovery, the order of the trial court and the administrative proceeding shall be stayed upon the filing of the petition for writ of mandamus, provided, however, the court of appeal may dissolve or modify the stay thereafter if it is in the public interest to do so. Where such review is sought from a denial of discovery, neither the trial court's order nor the administrative proceeding shall be stayed by the court of appeal except upon a clear showing of probable error.

(i) Where the superior court finds that a party or his attorney, without substantial justification, failed or refused to comply with Section 11507.6, or, without substantial justification, filed a petition to compel discovery pursuant to this section, or, without substantial justification, failed to comply with any order of court made pursuant to this section, the court may award court costs and reasonable attorney fees to the opposing party. Nothing in this subdivision shall limit the power of the superior court to compel obedience to its orders by contempt proceedings.

Comment. Former Section 11507.7 is superseded by Sections 646.310-646.380 (compelling discovery).

§ 11508 (repealed). Time and place of hearing

11508. (a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First or Sixth Appellate District, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth Appellate District, and in the County of Sacramento if the transaction occurred or the respondent resides within the Third or fifth Appellate District.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides.

(3) The parties by agreement may select any place within the state.

Comment. Former Section 11508 is superseded by Sections 643.310 (time and place of hearing) and 643.330 (venue and change of venue).

§ 11509 (repealed). Notice of hearing

11509. The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense.

The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before [here insert name of agency] at [here insert place of hearing] on the _____ day of _____, 19___, at the hour of _____, upon the charges made in the accusation served upon you. You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to [here insert appropriate office of agency].

Comment. Former Section 11509 is superseded by Sections 643.310 (time and place of hearing) and 643.340 (notice of hearing).

§ 11510 (repealed). Subpoenas

11510. (a) Before the hearing has commenced, the agency or the assigned administrative law judge shall issue subpoenas and subpoenas duces tecum at the request of any party for attendance or production of documents at the hearing. Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. After the hearing has commenced, the agency itself hearing a case or an administrative law judge sitting alone may issue subpoenas and subpoenas duces tecum.

(b) The process issued pursuant to subdivision (a) shall be extended to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. No witness shall be obliged to attend unless the witness is a resident of the state at the time of service.

(c) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day shall be entitled in addition to fees and mileage to a per diem compensation of three dollars ($3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.

Comment. Former Section 11510 is superseded by Section 646.140 (subpoenas).

§ 11511 (repealed). Depositions

11511. On verified petition of any party, an agency may order that the testimony of any material witness residing within or without the State be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of his testimony; a showing that the witness will be unable or can not be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. Where the witness resides outside the State and where the agency has ordered the taking of his testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 of the Government Code.

Comment. Former Section 11511 is superseded by Section 646.130 (depositions).

§ 11511.5 (repealed). Prehearing conferences

11511.5. (a) On motion of a party or by order of an administrative law judge, the administrative law judge may conduct a prehearing conference. The administrative law judge shall set the time and place for the prehearing conference, and the agency shall give reasonable written notice to all parties.

(b) The prehearing conference may deal with one or more of the following matters:

(1) Exploration of settlement possibilities.

(2) Preparation of stipulations.

(3) Clarification of issues.

(4) Rulings on identity and limitation of the number of witnesses.

(5) Objections to proffers of evidence.

(6) Order of presentation of evidence and cross-examination.

(7) Rulings regarding issuance of subpoenas and protective orders.

(8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(9) Any other matters as shall promote the orderly and prompt conduct of the hearing.

(c) The administrative law judge shall issue a prehearing order incorporating the matters determined at the prehearing conference. The administrative law judge may direct one or more of the parties to prepare a prehearing order.

Comment. Former Section 11511.5 is superseded by Article 6.5 (commencing with Section 647.010) (prehearing conference).

§ 11513 (repealed). Evidence

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing unless offered to attack the credibility of the complainant, as provided for under subdivision (j). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(d) The hearing shall be conducted in the English language, except that a party who does not proficiently speak or understand the English language and who requests language assistance shall be provided an interpreter approved by the administrative law judge or hearing officer conducting the proceedings. The cost of providing the interpreter shall be paid by the agency having jurisdiction over the matter if the administrative law judge or hearing officer so directs, otherwise the party for whom the interpreter is provided.

The administrative law judge's or hearing officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay, except with respect to hearings before the Workers' Compensation Appeals Board or the Division of Industrial Accidents relating to worker's compensation claims. With respect to these hearings, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the

Workers' Compensation Appeals Board or the Administrative Director of the Division of Industrial Accidents, as appropriate. Such an interpreter shall be selected pursuant to regulations issued by both of the following:

(1) The State Personnel Board which shall establish criteria for an interpreter's proficiency in both English and the language in which the person will testify.

(2) The employing agency which shall establish materials and examinations for an interpreter's understanding of its technical program terminology and procedures.

(e) The State Personnel Board shall compile and publish a list of interpreters it has determined to be proficient in various languages and any interpreter so listed shall be eligible to be examined by each employing agency relating to its technical program terminology and procedures. Any interpreter whose language proficiency and knowledge of the terminology and procedures has been satisfactorily determined by the employing agency shall be deemed to be approved by an administrative law judge or a hearing officer of the agency.

(f) In the event that interpreters on the approved list cannot be present at the hearing, or if there is no interpreter on the approved list for a particular language, the hearing agency shall have discretionary authority to provisionally qualify and utilize other interpreters.

(g) Every state agency affected by this section shall advise each party of their right to an interpreter at the same time that each party is advised of the hearing date. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing so that appropriate arrangements can be made.

(h) The rules of confidentiality of the agency, if any, which may apply in an adjudicatory hearing, shall apply to any interpreter in the hearing, whether or not the rules so state.

(i) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.

As used in subdivisions (d) and (e), the terms "administrative law judge" and "hearing officer" shall not be construed to require the use of an Office of Administrative Hearings' administrative law judge or hearing officer.

(j) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

(k) For purposes of this section "complainant" means any person claiming to have been subjected to conduct which constitutes sexual harassment, sexual assault, or sexual battery.

Comment. Subdivision (a) of former Section 11513 is superseded by Section 648.330(a) (oral evidence).

Subdivision (b) is superseded by Section 648.320 (presentation of evidence).

The first two sentences of subdivision (c) are superseded by Section 648.410 (technical rules of evidence inapplicable). The third sentence is continued in Section 648.450 (hearsay evidence and the residuum rule). The fourth sentence is superseded by Sections 648.440 (privilege) and 648.420 (discretion of presiding officer to exclude evidence). The second paragraph is continued in Section 648.470(b).

Subdivision (j) is continued in Section 648.470(c).

Subdivision (k) is continued in Section 648.470(a).

§ 11514 (repealed). Affidavits

11514. (a) At any time 10 or more days prior to a hearing or a continued hearing, any part may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you

notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party).

Comment. Former Section 11514 is continued in Section 648.340 (affidavit evidence), except that the seven day period for service of notice of intent to produce affidavit evidence is changed to 30 days.

§ 11520 (repealed). Defaults

11520. (a) If the respondent fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that he is entitled to the agency action sought, the agency may act without taking evidence.

(b) Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.

Comment. Former Section 11520 is superseded by Section 648.130 (default).